

**STATE OF MICHIGAN
IN THE SUPREME COURT**

G.C. TIMMIS & COMPANY,
Plaintiff-Appellant,

Supreme Court
No. 120035

-vs-

Court of Appeals
No. 210998

GUARDIAN ALARM COMPANY,

Defendant-Appellee.

Oakland County Circuit Court
L.C. No. 97-549069

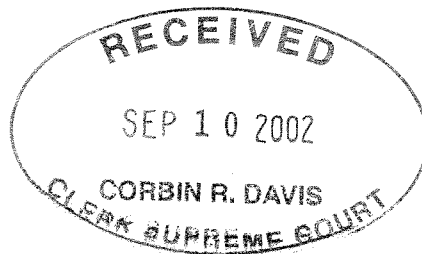
DAVID V. TIMMIS (P40539)
VANDEVEER GARZIA
Attorney for Plaintiff-Appellant
1450 West Long Lake Road, Suite 100
Troy, Michigan 48098-6330
(248) 312-2800

BARRY M. ROSENBAUM (P26487)
Attorney for Defendant-Appellee
2000 Town Center, Suite 1500
Southfield, MI 48075
(248) 353-7620

VANDEVEER GARZIA, P.C.

BRIEF ON APPEAL OF PLAINTIFF-APPELLANT

ORAL ARGUMENT REQUESTED



**STATE OF MICHIGAN
IN THE SUPREME COURT**

G.C. TIMMIS & COMPANY,
Plaintiff-Appellant,

Supreme Court
No. 120035

-vs-

Court of Appeals
No. 210998

GUARDIAN ALARM COMPANY,

Defendant-Appellee.

Oakland County Circuit Court
L.C. No. 97-549069

DAVID V. TIMMIS (P40539)
VANDEVEER GARZIA
Attorney for Plaintiff-Appellant
1450 West Long Lake Road, Suite 100
Troy, Michigan 48098-6330
(248) 312-2800

BARRY M. ROSENBAUM (P26487)
Attorney for Defendant-Appellee
2000 Town Center, Suite 1500
Southfield, MI 48075
(248) 353-7620

VANDEVEER GARZIA, P.C.

BRIEF ON APPEAL OF PLAINTIFF-APPELLANT

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

	Page(s)
ORDER APPEALED FROM AND RELIEF SOUGHT	i
QUESTION PRESENTED FOR REVIEW	ii
INDEX OF AUTHORITIES	iv
CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS	1
A. Material Proceedings	1
B. Statement of Facts	1
ARGUMENT	9
CASE LAW FROM OTHER JURISDICTION	21
RELIEF REQUESTED	25
APPENDIX	1a

INDEX OF AUTHORITIES

<u>CASES</u>	Page(s)
<i>Amburgey v. Sauder</i> , 238 Mich App 228, 231; 605 NW 2 nd 84 (1999)	10
<i>Cardillo v Canusa Extrusion Engineering, Inc.</i> , 145 Mich App 361 (1985)	12, 13, 16
<i>Eaton Associates v Highland Broadcasting</i> , 81 AD 2d 603 [2d Dept 1981]	21
<i>Lane v. KinderCare Learning Centers, Inc.</i> , 231 Mich App 689, 695; 588W 2 nd 715 (1998)	10
<i>Legros v Tarr</i> , 44 Ohio St 3d 1; 540 N.E. 2d 257 (1989)	23
<i>Shaffer v. Beinhorn</i> , 190 Cal 569, 573-574 [213 P960]	23
<i>Spiek v. Dep't. of Transportation</i> , 456 Mich 331, 337; 572 NW 2 nd 201 (1998)	9
<i>Tope v. Howe</i> , 179 Mich App 91 (1989)	9
<i>Turner Holdings, Inc. v Howard Miller Clock Co.</i> , 657 F Sup. 1370 (WD Mich. 1987)	14-16
<i>Zappas v King William Press, Inc.</i> , 10 Cal App 3d 768 (1970)	22
 <u>STATUTES</u>	
MCLA 339.2501	7, 9
MCLA 339.2512a	11
 <u>COURT RULES</u>	
MCR 2.116(C)(7)	9
MCR 2.116(C)(8)	9
MCR 2.116(C)(10)	9

ORDER APPEALED FROM AND RELIEF SOUGHT

The Plaintiff-Appellant seeks reversal of the Court of Appeals decision issued on August 24, 2001, which reversed the trial court's denial of the Defendant-Appellee's Motion for Summary Disposition and remanded this action for action consistent with the Opinion of the Court of Appeals.

VANDEVEER GARZIA, P.C.

QUESTION PRESENTED FOR REVIEW

- (1) **WHETHER FACT QUESTIONS EXISTED WHICH SUPPORTED THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION FOR SUMMARY DISPOSITION WHICH ARGUED THAT A LICENSED INVESTMENT BANKER, WITH A SUB-SPECIALTY IN MERGERS AND ACQUISITIONS, IS REQUIRED TO BE LICENSED UNDER THE REAL ESTATE BROKER'S LICENSING ACT IN CONNECTION WITH PROVIDING INVESTMENT BANKING ADVICE AND CONSULTATION RELATING TO A MERGER OR ACQUISITION.**

Plaintiff-Appellant answers: Yes

Defendant-Appellee answers: No

Oakland County Circuit Court answered: Yes

The Court of Appeals answered: No

CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

A. Material Proceedings

On March 26, 1998, the Honorable Jessica R. Cooper, Circuit Court Judge for the County of Oakland, denied the Defendant's Motion for Summary Disposition. (See **Appendix, pp. 20a-21a**) On September 28, 1998, the Michigan Court of Appeals granted Defendant's Application for Leave to Appeal the Order Denying Motion for Summary Disposition. (See **Appendix, p. 22a**) On August 24, 2001, the Michigan Court of Appeals reversed the denial of Defendant's Motion for Summary Disposition and remanded this matter to the Trial Court. (See **Appendix, pp. 23a-32a**) On September 14, 2001, the Plaintiff-Appellant filed an Application for Leave to Appeal to the Michigan Supreme Court in a timely fashion. On July 2, 2002, the Michigan Supreme Court granted the Application for Leave to Appeal to the Michigan Supreme Court. (See **Appendix, p. 33a**)

B. Statement of Facts

As will be set forth below, the Plaintiff, **G. C. TIMMIS & COMPANY**, is a sophisticated Investment Banking Firm, with a specialty in Mergers and Acquisitions. The Plaintiff has extensive experience and contacts in the home security industry, having previously provided advise and consultation to other members of the industry. The Plaintiff provided similar investment banking advice and consultation to the Defendant, **GUARDIAN ALARM COMPANY**, with regard to its position in the market and strategy for the future. As a direct result of the aforementioned investment banking services, the Defendant developed a strategy which included

the acquisition of a competitor, Metrocell Security. Despite the successful relationship between the Plaintiff and the Defendant, the Defendant has refused to pay the agreed upon fee for investment banking services.

As the Defendant's Motion in the Trial Court was filed prior to the completion of discovery, the Plaintiff, through its principal, **Mr. Gerald C. Timmis**, submitted an Affidavit which included a proper foundation for him to provide expert testimony on issues involving investment banking and which provided a detailed account of the relevant facts involved in this matter. The Affidavit will therefore be reproduced, in its entirety, as follows:

GERALD C. TIMMIS, III, being first duly sworn deposes and states that he can testify with personal knowledge, as follows:

1. I am Managing Director of **G.C. TIMMIS & COMPANY**;
2. I received a Bachelor of Arts degree in Economics from the University of Michigan in 1979;
3. I received a Masters of Science in Industrial Administration from Carnegie-Mellon University, Graduate School of Industrial Administration in 1985;
4. I have completed all course work necessary for a Doctorate in Economics from Carnegie-Mellon University, Graduate School of Industrial Administration;
5. From 1985 to 1991, I was employed by Goldman, Sachs & Company, a noted Wall Street investment bank, where I achieved the position of Vice-President in the Merchant Bank and the Merger Department.
1. From 1991 to 1993, I was employed by W.Y. Campbell & Company in

Detroit, Michigan as Managing Director, with a focus on mergers and acquisitions;

2. In 1993, **G.C. TIMMIS & COMPANY** was founded and I have acted as Managing Director to the present date;

3. **G.C. TIMMIS & COMPANY** is a Registered Investment Advisor and a Registered Broker-Dealer with the State of Michigan, Department of Commerce, Corporations and Securities Bureau;

4. **G.C. TIMMIS & COMPANY** is a Broker-Dealer member of the National Association of Securities Dealers ("NASD");

5. **G.C. TIMMIS & COMPANY** is a Registered Investment Advisor with the Securities and Exchange Commission.

6. **G.C. TIMMIS & COMPANY** is a registered agent of the Securities Investors Protection Corporation ("SIPC");

7. Throughout my professional career as an investment banker, I have primarily specialized in "Mergers and Acquisitions;"

8. During the course of my career, I have become familiar with the home security industry;

9. On October 25, 1995, I forwarded the correspondence that is attached to this Affidavit as Exhibit A, introducing myself and the services my firm provides to Mr. Milton Pierce, Chief Executive Officer for the Defendant, **GUARDIAN ALARM COMPANY**;

10. In a follow-up to my October 25, 1995 correspondence, I contacted Mr. Pierce on several occasions to again discuss the services my firm could provide to **GUARDIAN**

ALARM COMPANY, resulting in the scheduling of a meeting on November 15, 1995;

11. On November 15, 1995, I met with Mr. Milton Pierce for approximately 1 1/2 to 2 hours to discuss the home security industry;

12. More specifically, I explained my knowledge of the home security industry to Mr. Pierce and expressed my concern that **GUARDIAN ALARM COMPANY** had not grown in a manner expected of the industry leader;

13. I explained to Mr. Pierce that the home security industry is a consolidating industry and that growth through acquisition would allow it to achieve economies of scales and market dominance in order to reach **GUARDIAN'S** maximum potential;

14. I further explained to Mr. Pierce that several of the other "players" in the industry, in the Metropolitan Detroit area, had a disproportionate effect on market pricing by their intensive advertising campaigns and discount pricing strategies, which could be alleviated by the acquisition of strategic targets.

15. At the close of the November 15, 1995 meeting, Mr. Pierce expressed his interest, but no agreement was reached;

16. I provided a copy of my firm brochure, an updated copy of which is attached as Exhibit B, and indicated to Mr. Pierce that he should contact me if he had any further questions;

17. After leaving the meeting, by the time I reached my office, Mr. Pierce had already contacted my office requesting additional information and several business cards (see Exhibit C);

18. After the initial meeting with Mr. Pierce, consideration was given to various other members of the home security industry;

19. Several additional telephone conferences ensued with Mr. Milton Pierce and a second meeting was scheduled for December 19, 1995;

20. At the December 19, 1995 meeting, the home security industry was again discussed and the services of my firm explained, at which time an agreement was reached;

21. The agreement between **G.C. TIMMIS & COMPANY** and **GUARDIAN ALARM COMPANY** specified that a success fee would be paid on any target that I contacted on **GUARDIAN'S** behalf that was eventually acquired;

22. The aforementioned fee would be based on the "Lehman Formula", (see Plaintiff's Complaint), with a minimum fee payable of \$100,000;

23. It was also agreed that there would be an overhang of two years, which is customary in the industry, specifying that **G.C. TIMMIS & COMPANY** would remain entitled to a fee if any target were acquired within two years from the date of the termination of the agreement;

24. After the December 19, 1995 meeting was adjourned, the various members of the home security industry were considered, and Metrocell Security was determined as a "target;"

25. Through my extensive dealings with Metrocell Security, I was familiar with their product line, as well as their position in the market, both of which would be advantageous to my client, **GUARDIAN ALARM COMPANY**;

26. During this time period, there were extensive telephone discussions with the client regarding the nature of the industry, strategy, pricing, marketing and the implications of any such acquisition;

27. Although there were extensive negotiations between **GUARDIAN ALARM** and Metrocell Security, the two parties were not able to agree on a purchase price, at which time I instructed Mr. Pierce to "let things percolate" and allow sufficient time to determine whether an agreement could be reached;

28. Unbeknownst to me, the Defendant consummated the purchase of Metrocell Security on July 3, 1996, without notifying me or acknowledging my fee and the two year overhang;

29. Despite my efforts, **GUARDIAN ALARM COMPANY** has refused my demand for payment of the \$100,000 success fee due upon the closing of the transaction;

30. **GUARDIAN ALARM COMPANY** apparently now takes the position that on a prior occasion, Mr. Richard Pierce, Secretary for **GUARDIAN ALARM COMPANY**, had made contact with Metrocell Security regarding possible acquisition, prior to my involvement;

31. It is clear that any effort by **GUARDIAN ALARM COMPANY** to acquire Metrocell Security was unsuccessful prior to my involvement and prior to my provision of investment banking services to **GUARDIAN ALARM COMPANY**;

32. **GUARDIAN ALARM COMPANY** also takes the position that the role that I provided in this transaction was simply that of a "broker," requiring licensing pursuant to

the Michigan Real Estate Broker's Act, MCLA 339.2501, et seq.;

33. The services that I provided to **GUARDIAN ALARM COMPANY** constituted "investment banking services," as opposed to "broker" services, which Defendant clearly understood throughout the course of our dealings;

34. Furthermore, the services provided by **G.C. TIMMIS & COMPANY** to **GUARDIAN ALARM COMPANY** are commonly understood in the investment banking industry and in the general business community to constitute "investment banking services", as opposed to "broker" services; and

35. Assuming arguendo that it is found that the services I provided to **GUARDIAN ALARM COMPANY** constituted "broker" services, this situation would be the first in which I acted in such a role (i.e., as a broker). (See **Appendix, pp. 34a-53a**)

Additional factual development has occurred following the trial court's denial of Defendant-Appellant's Motion for Summary Disposition. On September 16, 1998, a Joint Final Pretrial Order (See **Appendix, pp. 54a-60a**) was filed which included the following **uncontested facts:**

6. The Defendant, through its representative, Mr. Richard Pierce, claims to have approached Metrocell Security, through its principal, Mr. Duane Rao, regarding the purchase of Metrocell Security **prior** to any involvement by **G.C. TIMMIS & COMPANY**.

This was apparently an attempt by the Defendant to detract from the importance of the investment banking services that were provided by **TIMMIS**, including identifying targets.

Unfortunately for the Defendant, however, Mr. Duane T. Rao, the President of Metrocell Security, was deposed on June 23, 1998. At that time, Mr. Rao provided the following testimony, which clearly establishes that the Defendant has misrepresented facts in an inappropriate attempt to improve its position in the consideration of the issues involved in the present matter:

Q. Had you done any business of any kind with the Pierces prior to 1996?

A. No, other than wind up a customer of theirs as I stated earlier a couple of time.

...

Q. Prior to discussions with Gerry **TIMMIS**, had you had any discussions with anyone about selling to **GUARDIAN ALARM**?

A. No.

(See Appendix, pp. 61a-64a)

In other words, despite the representation by the Defendant that Mr. Richard Pierce, on behalf of the Defendant, had contacted Mr. Duane Rao prior to the involvement of **G.C. TIMMIS & COMPANY**, *Mr. Rao has indicated that this is simply not true.*

It should also be noted that the Defendant does not claim that **TIMMIS'** involvement in this matter was without authority, as evidenced by the following testimony by Mr. Milton Pierce, again, the CEO of **GUARDIAN** Alarm Company:

Q. Okay. When *you* asked Mr. **TIMMIS** to contact Mr. Rao, *you* asked him to contact Mr. Rao on *your* behalf, correct? On behalf of **GUARDIAN** Alarm, correct?

A. Yeah. (See Appendix, pp. 65a-69a)

Given the fact that **GUARDIAN** now denies any agreement with Mr. **TIMMIS**, it is quite puzzling to consider why **TIMMIS** would contact Metrocell Security on **GUARDIAN'S** behalf if there was not some financial incentive for **TIMMIS**.

ARGUMENT

I. Standard of Review

The Supreme Court's review of the Court of Appeals' decision to reverse the Trial Court's denial of Defendant's Motion for Summary Disposition is "de novo". *Spiek v Dep't. of Transportation*, 456 Mich 331, 337; 572 NW 2nd 201 (1998). Although the Defendant's motion was brought in the lower court pursuant to MCR 2.116(C)(7)(8) and (10), the Court of Appeals came to the conclusion that the Trial Court considered documentary evidence in addition to the pleadings to conclude that a genuine issue of material fact existed and therefore reviewed the claim under MCR 2.116(C)(10).

A Motion for Summary Disposition brought pursuant to MCR 2.116(C)(10) tests the factual support of a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also any depositions, affidavits, admissions, or other documentary evidence that is submitted by the parties. MCR 2.116(G)(5). The motion must be denied if there are any genuine issues of material fact and the court is liberal in finding such a genuine issue of material facts. *Tope v. Howe*, 179 Mich App 91 (1989).

Additionally, the interpretation of a statute is a question of law which also must be reviewed de novo. *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW 2nd 84 (1999). The interpretation of a statute should attempt to give effect to the intent of the Legislature. *Lane v KinderCare Learning Centers, Inc* 231 Mich App 689, 695; 588 NW 2nd 715 (1998).

II. **Whether fact questions existed which supported the trial court's denial of defendant's motion for summary disposition which argued that a licensed Investment Banker, with a sub-specialty in mergers and acquisitions, is required to be licensed under the real estate broker's licensing act in connection with providing investment banking advice and consultation relating to a merger or acquisition.**

The issue involved in the present matter involves a substantial question regarding the application of a legislative act and involves legal principles of major significance. **MCL 339.2501**, et. seq., is commonly known as the "**Real Estate Broker's Licensing Act**". Undeniably the Act requires a real estate broker to be licensed under the Act in order to maintain an action in a court of law for the collection of compensation for the performance of real estate broker services.

Investment Bankers, particularly those involved in the sub-specialty of Mergers and Acquisitions, commonly provide advice and consultation which results in their clients acquiring businesses or business opportunities. Investment Bankers generally do not possess real estate broker's licenses, but are subject to much more stringent and rigorous licensing requirements, as set forth below.

The issue of whether an Investment Banker must be licensed under the Real Estate Broker's

Licensing Act in order to collect compensation for investment banking services, which result in the acquisition of a business or business opportunity, is of significant public interest. This is due to the fact, as stated above, that Investment Bankers generally do not possess real estate broker's licenses, but are invariably involved in transactions involving significant businesses or business opportunities, for which they must be compensated or be permitted an opportunity to maintain an action in a court of law for the collection of such compensation. The denial of the right to maintain an action for the collection of such compensation could have a chilling affect on the activity or involvement of Investment Bankers on transactions in the State of Michigan, which would work to the detriment of buyers and sellers of businesses or business opportunities.

The present dispute involves the Defendant's effort to avoid paying for services for which it had agreed to pay. The mechanism that has been employed by the Defendant in its effort to "beat its bill" is the Michigan Real Estate Broker's Licensing Act. After the filing of the Plaintiff's Complaint, the Defendant filed a Motion for Summary Disposition, alleging that the conduct of the Plaintiff constituted "broker services", as opposed to "investment banking services". As will be explained below, the Appellant's argument is flawed and the conduct of the Plaintiff constituted the advice and consultation of an Investment Banker, with a sub-specialty in Mergers and Acquisitions.

In support of its attempt to avoid payment of its obligation, the Defendant has cited MCLA 339.2512a, which states as follows:

A person engaged in the business of, or acting in the capacity of, a person required to be licensed under this article, shall not maintain an action in a court of this state for collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person

was licensed under this article at the time of the performance of the act or contract.

This misguided attempt fails to recognize that **G.C. TIMMIS & CO.** seeks compensation for investment banking services, not a brokerage fee covered under the Act. In fact, the Defendant knew full well that **G.C. TIMMIS & CO.**, was an Investment Banking Firm, as opposed to a real estate broker, as evidenced in the deposition of Mr. Milton Pierce, Chief Executive Officer for **GUARDIAN ALARM COMPANY**:

Q. Do you know what a business broker is?

A. Yes.

Q. What's a business broker?

A. I have to believe it is someone who makes transactions from buying and selling businesses.

Q. Did you understand that TIMMIS was a (business¹) broker?

A. No.
(See Appendix, pp. 65a-69a)

The primary case upon which the Defendant has relied in its attempt to avoid paying compensation to the Plaintiff is Cardillo v Canusa Extrusion Engineering, Inc., 145 Mich App 361 (1985), which provides, in pertinent part, as follows:

"Under Michigan Law, a party who brings suit to recover a **brokerage fee** must allege that he is a licensed real estate broker. Thus, if Plaintiffs come within the statutory definition of real estate broker, they cannot recover the commission or finder's fee they sought in the trial court. (Emphasis added) *Id.* at 365."

¹ In the deposition, the Court Reporter obviously made a mistake when it inserted "Brinks" into the question instead of "Business". This becomes especially clear when the context of the question is considered.

Again, G.C. TIMMIS & COMPANY does not seek a "brokerage fee" and is therefore not required to prove that he is a licensed real estate broker.

To the contrary, G.C. TIMMIS & COMPANY is an Investment Banking Firm and the only damages sought in this lawsuit are the Investment Banking fees that the Defendant has failed to pay. As explained above, there was extensive contact between the parties to discuss the nature and extent of the Defendant's business and industry. Furthermore, G.C. TIMMIS & COMPANY provided advise and consultation with regard to the home security industry, as well as strategy and pricing for any target acquisitions. Additionally, G.C. TIMMIS & COMPANY provided advice and consultation with regard to the implications of the acquisitions of any such targets, or the failure to acquire any such targets, such as competitive advantage and pricing for security services.

In *Cardillo*, supra, the Court provided the following guidance with regard to the application of the Michigan Real Estate Brokers Act:

In application of the licensing provisions to a particular fact situation, we look to both the nature of the activities performed and the character of the property involved. *Id.* at 368.

In *Cardillo*, the Plaintiff sued seeking a commission on its agreement to "find a buyer for the assets of the Defendant." *Id.* at 364. There was no allegation by the Plaintiff that it was an "Investment Banker," and there was no further explanation of the services to be provided by the Plaintiff, other than finding a purchaser for the assets of the Defendant.

In the present matter, there were very specific "Investment Banking," as opposed

to "broker," services to be provided by **G.C. TIMMIS & COMPANY**. A similar situation was encountered in Turner Holdings, Inc. v Howard Miller Clock Co., 657 F Sup. 1370 (WD Mich. 1987). As in the present matter, the Plaintiff in Turner Holdings was an investment banker. In fact, the Court gave great weight to the educational and employment background of the Plaintiff, all of which focused on investment banking, and more specifically, "Mergers and Acquisitions." *Id* at 1372.

In Turner Holdings, the court also noted the following expert testimony explaining the nature of investment banking services:

"He identified two major functions of an investment banker: raising funds for corporations and acting as a financial advisor. Schinagel explained it that when a client is interested in a merger or an acquisition, the role of the investment banker includes identifying appropriate targets, educating the client about the industry, and characterizing the attractiveness in light of the client's needs, of various companies. At trial, Schinagel was asked to compare the roles of an investment banker and business broker. His response was that a business broker generally represents a seller who wants to list a business with the broker, while investment banker represents either sellers or buyers. He also observed that while business brokers usually have small family owned businesses like bars and grills as clients, the client base of an investment banker tends to be much broader. According to Schinagel, an investment banker is a "businessman's businessman." *Id.* At 1377.

In the present matter, the services provided by **G.C. TIMMIS & COMPANY** to **GUARDIAN** practically mirror the explanation of the role of an "investment banker" in Turner Holdings, *supra*, as can be seen from the following observations:

(a) An investment banker is involved in *"identifying appropriate targets for his client."* TIMMIS identified Metrocell, the acquired company, as a target for purchase by his client, GUARDIAN.

(b) An investment banker involves himself in *"educating the client about the industry."* TIMMIS provided education to his client regarding the home security industry, and the position of GUARDIAN within same.

(c) An investment banker is involved in *"characterizing the attractiveness, in light of the client's needs, of various companies."* TIMMIS discussed with GUARDIAN the attractiveness of various targets and the focus was eventually placed on GUARDIAN, in light of their extensive advertising and their disproportionate effect on industry pricing.

(d) *"A business broker generally represents a seller who wants to list a business with the broker, while an investment banker represents either sellers or buyers."* As explained in the firm brochure provided by TIMMIS to GUARDIAN, TIMMIS represents both sellers and buyers, and in this case, represented the buyer.

(e) *"While business brokers usually have small family-owned businesses like bars and grills as clients, the client base of investment bankers tends to be much broader."* Again, as explained in the firm brochure provided by TIMMIS to GUARDIAN, TIMMIS possesses a very broad base of clients, which does not include the typical clients of a business broker, i.e. bars, shops, etc.

(f) An investment banker is a *"businessman's businessman."* Certainly TIMMIS is a businessman's businessman, and in this case, Mr. Milton Pierce of Guardian, was that businessman.

In conclusion, the Court in *Turner Holdings*, held as follows:

[T]he activities of the major banking firms in arranging mergers and takeovers are clearly not within the ambit of a "real estate broker regulation." This conclusion is supported by the real

estate licensing requirements provided for in the Act. They are not, in anyway, related to the services which investment bankers perform." *Id.* at 1378. (emphasis added)

Although the **GUARDIAN** is required to take the spurious position that Cardillo and Turner Holdings are at odds, they simply involve two different sets of circumstances. As stated on page 8 of the Defendant's Brief in the Court of Appeals, "in Cardillo, the plaintiff entered into an oral agreement with the defendant to find a buyer for its assets". In the present matter, as well as in Turner Holdings, the "agreement" was to provide investment banking services.

It is also interesting to note that even in the Turner Holdings case, citation is made to the Cardillo matter for the proposition that a "court (should) look to both the nature of the activities performed and the character of the property involved." Cardillo at 413. An examination of the services provided (investment banking services) and the property involved (security monitoring agreements), certainly point to a finding that investment banking services were provided by **G.C. TIMMIS & CO.**, as opposed to real estate broker services.

In fact, the only testimony on this subject was provided in the form of the Affidavit signed by Mr. Gerald C. **TIMMIS**, which was attached to Plaintiff's Response to Defendant's Motion for Summary Disposition (and is attached hereto as **Appendix, pp. 34a-53a**). The Affidavit by **TIMMIS** includes expert testimony (in fact, the only expert testimony offered at oral argument on the Defendant's motion), which provided a clear indication that the services rendered by **TIMMIS** were of an "investment banking" nature. The Appellant-Defendant provided no testimony or evidence to oppose the Affidavit by **TIMMIS**.

In the lower court, the Defendant claimed that **TIMMIS** was involved in the actual "negotiations" for the purchase price to be paid by **GUARDIAN** for Metrocell Security in an attempt to mischaracterize the services of **TIMMIS**. The Defendant referenced a February 26, 1997 letter from Mr. John J. Walsh, **TIMMIS**' then-corporate attorney, who wrote a letter to **GUARDIAN** attempting to amicably resolve the dispute herein. The attorney for the Defendant has seized upon Mr. Walsh's unfortunate and inaccurate use of the word "negotiations" in the correspondence in an attempt to contort the nature of the services provided by **TIMMIS**. The Defendant then makes the boldest statement of its position with regard to whether **TIMMIS** engaged in negotiations by claiming "**TIMMIS never denied** it had conducted negotiations on behalf of **GUARDIAN** with the Rao group" (without offering any evidence that **TIMMIS** did, in fact, engage in negotiations).

The testimony of **TIMMIS** clearly establishes that "there were extensive negotiations between **GUARDIAN ALARM** and Metrocell Security" (See **Appendix, p. 39a**, paragraph 32), to the exclusion of himself (i.e. he was not involved in the negotiations). The later, clandestine negotiations that eventually led to the consummation of the transaction certainly did not include **TIMMIS**, which has been repeatedly admitted by the Defendants (in fact, affirmatively asserted by the Defendant in its attempt to avoid paying the Plaintiff's fee). The Defendant's position that "**TIMMIS never denied**" being involved in negotiations is simply a ridiculous assertion, as the question was never asked during his deposition. Clearly, the testimony of **TIMMIS** in his affidavit, at paragraph 32, clearly establishes his position (which is corroborated by Milton Pierce, the principal of the Defendant and Mr. Duane Rao of the acquired

that he was **not** involved in the negotiations.

While the Plaintiff is of the position that a finding that it had been involved in “negotiations” is not fatal to **TIMMIS**’ claim, the only evidence of such involvement by **TIMMIS** comes from the factually inaccurate February 26, 1997 correspondence of Mr. John J. Walsh. A MOTION IN LIMINE REGARDING FEBRUARY 26, 1997 CORRESPONDENCE FROM MR. JOHN J. WALSH TO MR. MILTON PIERCE was filed in the trial court on September 23, 1998. (See **Appendix, pp. 70a-79a**) The Plaintiff’s position in the motion is based on the fact that this mischaracterization of the efforts of **TIMMIS** occurred during settlement discussions and are therefore inadmissible pursuant to Michigan Rule of Evidence 407. The Motion was still pending at the time Defendant filed its Application for Leave to File Interlocutory Appeal.

Furthermore, and more importantly, the mischaracterization by Mr. Walsh does not comport with the evidence produced in this case by the participants themselves. In fact, Mr. Milton Pierce was questioned on this subject and provided the following testimony:

Q. Would you classify the dealings that you were having on behalf of **GUARDIAN** Alarm with Metrocell through **TIMMIS** during that time period as **negotiations**?

A. No. (See **Appendix, p. 66a**)

It is therefore clear that by the Defendant’s own admission, **TIMMIS** was not involved in “negotiations.”

Additionally, the negotiations which resulted in **GUARDIAN’S** acquisition of Metrocell occurred between Mr. Duane Rao on behalf of Metrocell and Mr. Richard Pierce and

Mr. Jeffrey Prough on behalf of **GUARDIAN**. On this subject, Mr. Duane Rao provided the following testimony:

Q. At your meeting with Richard Pierce and Jeff Prough, were your discussions with Gerry **TIMMIS** mentioned at all?

A. My meeting with Jeff and Richard Pierce in my office lasted no more than fifteen minutes. We never discussed Gerry **TIMMIS**' situation at all or Gerry **TIMMIS** at all. We discussed what the number was and they agreed to it and told them about the company and it was fast, quick and done.

Q. At any time either at that meeting with Mr. Pierce and Mr. Prough or subsequent, did you ever discuss with anyone from **GUARDIAN** Gerry **TIMMIS**' involvement in the negotiations?

A. I don't believe. (See **Appendix, pp. 63a-64a**)

In conclusion, it is clear that by the admission of the Defendant, as well as the testimony of the only witness who was actually involved in the negotiations that was also deposed (Mr. Rao), that negotiations on behalf of **GUARDIAN** were conducted by **GUARDIAN** itself. Furthermore, it is assumed that the February 26, 1997 correspondence of Mr. Walsh, which includes the factual inaccuracy, will eventually be excluded by way of Defendant's Motion in Limine. **It is important to remember that the only evidence upon which the Defendant can rely to attempt to establish that TIMMIS was involved in negotiations is the inaccurately worded correspondence of the prior attorney, Mr. John T. Walsh.** At a bare minimum, a fact question exists which prevents the granting of the Defendant's Motion for Summary Disposition on the issue of whether **TIMMIS** was involved in the negotiations

(although the Plaintiff remains of the position that any alleged incidental involvement in the negotiations is not fatal to a claim for compensation for investment banking services).

Regardless of whether the Plaintiff was involved in the “negotiations” (which the evidence has established he was not), he is entitled to compensation for the services he has provided. An Investment Banker who finds himself in a situation similar to the present matter is not simply an unregulated interloper seeking a windfall, he is a highly educated, highly trained and highly regulated businessman.

As stated in the affidavit of TIMMIS, he is a **Registered Investment Advisor** and a **Registered Broker-Dealer** with the **State of Michigan, Department of Commerce, Corporations & Securities Bureau**. He is also a **Broker-Dealer Member of the National Association of Securities Dealers (“NASD”)**; a **Registered Investment Advisor** with the **Securities and Exchange Commission (“SEC”)**; and a **Registered Agent of the Securities Investors Protection Corporation (“SIPC”)**.

As well as the extensive testing (e.g., the Series 7, 24 and 63 Certifications that are prerequisites for the above-listed designations) that goes along with these distinctions, there are also reporting and capital requirements of investment bankers. While the Plaintiff does not envision a real estate broker as the “rumpled, unkempt, slightly overweight real estate salesman” as stated in the Defendant’s Brief in the Court of Appeals, the Plaintiff does assert that there is much more strict regulation, capital requirements and scrutiny of Investment Bankers due to the specialized nature of the services they provide.

Finally, the Defendant argued and the Court of Appeals found convincing, that the specific exemptions included in the Real Estate Broker's Licensing Act for, inter alia, attorneys were evidence of the legislature's intent to include Investment Bankers. The fact that these exemptions exist is completely irrelevant to the issues at hand. Again, the Plaintiff stresses that it is not seeking compensation for any act that is contemplated under the Act (he provided investment banking services) and therefore **need not fit itself into one of the recognized exemptions.**

In conclusion, the Plaintiff states that the Trial Court did not err in finding genuine issues of material fact which prevented the granting of Defendant's Motion for Summary Disposition. In fact, the Trial Court properly ruled that the Affidavit of **TIMMIS**, which set forth expert testimony on the relevant issues, clearly established that **TIMMIS** was seeking compensation for investment banking services, not "broker" services as contemplated under the Real Estate Broker's Licensing Act.

CASE LAW FROM OTHER JURISDICTIONS

It is very significant to note that caselaw from other jurisdictions also support the claim of **TIMMIS** for his investment banking fee. The Appellate Division of the Supreme Court of the State of New York addressed a situation involving facts very similar to the present action. In *Eaton Associates v Highland Broadcasting*, 81 AD 2d 603 [2d Dept 1981], the Defendant hired the Plaintiff to present and market a refinancing package. Defendant was the owner of several radio stations and was in need of new capital to finance the further development of its FM

stations. Plaintiff provided market analysis and a comprehensive business plan relating to market share, cash flow and expenses for Defendant to present to lending institutions to obtain financing to increase the Defendant's spending capital.

The Plaintiff sought payment of commissions from Defendant after Defendant indeed procured two separate mortgages to increase its financing abilities. The Defendant subsequently refused to pay the commissions arguing that the commissions were barred under § 440-a of New York's Real Estate Broker Act Which defined a "real estate broker" as "any person, firm or corporation, who...negotiates or offers or attempts to negotiate, a loan secured or to be secured by a mortgage or other encumbrance upon...real estate".

The court held that preparing a financial plan and advising the Defendant about a financially advantageous business opportunity or strategy fell outside of the scope of real estate brokerage services. The Court further noted that the purpose of broker licensing regulations is "to protect dealers from unlicensed persons acting as brokers and to protect the public from inept, inexperienced persons". *Id* at 604. This concern is not present in the case of a "financial consultant" or investment banker.

In Zappas v King William Press, Inc, 10 Cal App 3d 768 (1970), the Plaintiffs sought compensation upon the consummation of a transaction where the Plaintiff orally agreed to:

(1) To find and introduce Defendants to a person or persons who would lease Defendants' real property in Torrance, California; and

(2) Introduce Defendants to a contractor and designer with whom Plaintiff--on his own behalf--had negotiated a tentative agreement for the construction of a building on the property. As consideration for the foregoing, Defendants orally promised that if the lease could be negotiated with such person or persons they would pay

Plaintiff five percent of the rent received therefrom, or \$60 per month, whichever amount was greater, on the first day of each month. *Id* at 770.

The Court of Appeals for the State of California provided the following insight into such a transaction:

The rule is well established that one who simply finds and introduces a prospective lessee to a person who wishes to lease his property need not be licensed by the State in order to recover commission for his services. Such an intermediary is protected by the so-called "finder's" exception to the Real Estate Licensing Act. The doctrine has been judicially developed by a line of decisions dating back to *Shaffer v. Beinhorn*, 190 Cal 569, 573-574 [213 P960]. The Defendant in that case, a licensed real estate broker, agreed to pay Plaintiffs two-thirds of the gross commission to which he would be entitled upon the sale of a certain ranch if they found or introduced him to a buyer of the ranch...In holding that the trial court erred in sustaining a demurrer to the complaint, the Supreme Court held that the complaint did not show that Plaintiffs were engaged in the business, or acting in the capacity of a real estate broker or salesman, since the contract with Defendant required them only to find or introduce Defendant to a prospective purchaser who ultimately became the actual buyer of the ranch. *Id* at 772.

In *Legros v Tarr*, 44 Ohio St 3d 1; 540 N.E. 2d 257 (1989), the Plaintiff was an investment banker who commenced an action seeking a "finders fee" or success fee based on the acquisition of a target company that he had identified and whose identity he had provided to the Defendant. Although the Ohio Supreme Court was not considering whether the Plaintiff was required to be licensed under Ohio's Real Estate Broker's Licensing Act, the Ohio Supreme Court provided the following interesting and relevant commentary:

As a threshold matter, we feel it is useful to clarify each Appellants' role in the corporate acquisitions at issue here. Although the lower courts refer to Legros as an investment broker

and spoke in terms of broker's commissions, there exists in the law a distinction between investment brokers and business opportunity finders. "A business finder is one who finds, interests, introduces, and brings parties together for a transaction that they themselves negotiate and consummate. A finder is an intermediary or middleman who is not necessarily involved in negotiating any of the terms of the transaction" (cite omitted). Essentially, the business finder is selling confidential information that he has developed himself. The identity of a potential acquisition candidate is the stock in trade of a finder or investment banking house.

In contrast, a broker not only introduces the party but also negotiates on behalf of one of the parties with the best interest of such party being his charge (cite omitted). In the instant case it is obvious, both from the contract between the parties and the actual activities of Legros, that Union Metal employed Butcher and Singer to act merely as a business finder, not broker.

Although the distinction between a finder and a broker is often more apparent than real, inasmuch as a person may act as a finder in one transaction and a broker in another...a review of the law of other jurisdictions demonstrates that an important difference exists in the circumstances under which finders and brokers may be compensated. In general, a broker retained to procure a buyer or seller of a business is entitled to a commission if he (1) produces a buyer or seller who is ready, willing and able to buy or sell on the principal's terms and (2) the transaction, or the readiness to perform on the principal's terms, directly results from the broker's efforts, without a break in continuity (cite omitted). In essence, a broker earns his fee only if he was the "procuring cause" of the transaction (cite omitted) even if the transaction is never actually finalized.

On the other hand, in the absence of contractual terms to the contrary, a finder is entitled to a commission or fee only if his introduction results in a transaction, irrespective of whether a third person brings the parties to agreement (cite omitted). The causation, or "procuring cause", requirement is satisfied by the mere introduction, even if negotiations are abandoned and later successfully resumed, provided the renewed negotiations are connected to and stem from the original introduction.

While additional case law from other jurisdictions could be considered, it is clear that there is a widely recognized distinction between real estate/business brokers and those performing investment banking services. In the present matter, it was only through the efforts of **TIMMIS** that the appropriate strategy and concerns were considered, and the target (Metrocell Security) was identified and eventually acquired by **GUARDIAN**. It is therefore the position of **TIMMIS** that the case law of the State of Michigan, as well as that of other jurisdictions, support his claim for a "success fee" as payment for providing investment banking services to **GUARDIAN**.

RELIEF REQUESTED

Plaintiff-Appellant respectfully request that the Supreme Court reverse the Court of Appeals and reinstate the Opinion and Order of the Trial Court denying Defendant's Motion for Summary Disposition.

VANDEVEER GARZIA

BY: 

DAVID B. TIMMIS (P40539)

Attorney for Plaintiff-Appellant

1450 West Long Lake Road, Suite 100

Troy, Michigan 48098-6330

(248) 312-2800

Dated: September 10, 2002

**STATE OF MICHIGAN
IN THE SUPREME COURT**

G.C. TIMMIS & COMPANY,
Plaintiff-Appellant,

Supreme Court
No. 120035

-vs-

Court of Appeals
No. 210998

GUARDIAN ALARM COMPANY,

Defendant-Appellee.

Oakland County Circuit Court
L.C. No. 97-549069

VANDEVEER GARZIA, P.C.

DAVID V. TIMMIS (P40539)
VANDEVEER GARZIA
Attorney for Plaintiff-Appellant
1450 West Long Lake Road, Suite 100
Troy, Michigan 48098-6330
(248) 312-2800

BARRY M. ROSENBAUM (P26487)
Attorney for Defendant-Appellee
2000 Town Center, Suite 1500
Southfield, MI 48075
(248) 353-7620

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF OAKLAND)

Melinda S. Julian states that on the 10th day of September, 2002, she served a true and correct copy of **Brief on Appeal**, upon:

Barry M. Rosenbaum
2000 Town Center, Suite 1500
Southfield, MI 48075

by depositing it in a government mail receptacle of the United States Postal Service, enclosed in a sealed envelope plainly addressed as indicated above, with postage thereon fully prepaid.

I declare under penalty of perjury that the statements above are true to the best of my information, knowledge and belief.